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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

FELIPE CORTEZ, JR.

Defendant and Appellant.

H034002

(Santa Clara County

Super. Ct. No. 165964)

Felipe Cortez (defendant) appeals from the denial of his motion to vacate a 1993 conviction.<sup>1</sup> We appointed counsel to represent him on appeal. Counsel filed a brief that set forth the facts and procedural history of the case. Counsel presented no argument for reversal but asked this court to review the record for error as mandated by *People v. Wende* (1979) 25 Cal.3d 436. On June 11, 2009, we notified defendant of his right to submit written argument on his own behalf within 30 days. To date, we have not received a response from defendant.

We have now reviewed the entire record and find no error in the trial court's order. Therefore, we affirm the order.

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<sup>1</sup> We granted defendant's request to take judicial notice of the entire record in Santa Clara County Superior Court case number 165964 (also designated with Municipal Court number C9237925) and this court's subsequent opinion in case number H028210.

On February 17, 2009, appellant filed, in propria persona, a "NOTICE OF MOTION TO VACATE; POINTS AND UNTHORITIES [*sic*]; EXHIBITS IN SUPPORT." Defendant's motion alleged that with regard to his July 6, 1993 conviction he was "not specifically advised by the court of all three separate potential immigration consequences of his plea, in violation of Penal Code 1016.5 and *People vs. Gutierrez* (2003) 106 C.A.4th 169, 173 . . . ."

In support of his motion, defendant provided two declarations in which he states under penalty of perjury that he did not receive advisements regarding immigration consequences, and had he been advised properly, he would not have pleaded guilty. Defendant cited to Penal Code section 1016.5 as well as various cases<sup>2</sup> concerning ineffective assistance of counsel for failure to advise and defend against immigration consequences, as well as the right to complete advisement of immigration consequences. Defendant emphasized that he was never given the judicial advisements mandated by Penal Code section 1016.5 and that the transcript of the change of plea hearing no longer exists.

On March 3, 2009, in a written order, the trial court denied the motion. The court held that to the extent that defendant's motion could be characterized as in the nature of habeas corpus, defendant's "present ICE custody is not state custody for purposes of bringing a habeas writ . . . ." Further, to the extent that the motion could be characterized as in the nature of coram nobis, his claim is not cognizable as such. Finally, the court noted that previously defendant had litigated a statutory motion to vacate pursuant to Penal Code section 1016.5, the denial of which was upheld on appeal by this court.<sup>3</sup>

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<sup>2</sup> *People v. Guitierrez, supra*, 106 Cal.App.4th 169; *People v. Totari* (2002) 28 Cal.4th 876; *People v Superior Court (Zamudio)* (2000) 23 Cal.4th 183.

<sup>3</sup> In fact, we conducted *Wende* review in defendant's previous appeal from the denial of his motion to vacate.

On March 6, 2009, defendant filed a notice of appeal with request for certificate of probable cause. The request for a certificate of probable cause was denied on March 17, 2009.

### *Discussion*

We have jurisdiction to review the trial court's March 3, 2009 order denying appellant's motion to vacate a guilty plea for failure to give immigration advisements. (*People v. Totari, supra*, 28 Cal.4th at p. 887.) As stated by another court, "Section 1016.5, enacted in 1977, by Statutes 1977, chapter 1088, section 1, became effective January 1, 1978. [Citation.] Subdivision (a) thereof requires that, prior to accepting a guilty or no contest plea to an offense not an infraction, a court must *advise* the defendant concerning specified immigration consequences. Subdivision (b), provides a remedy when a court fails to give the requisite advisements and the plea may have a specified immigration consequence(s): a defendant may *move to vacate* the judgment, withdraw said plea, and enter a plea of not guilty." (*People v. Carty* (2003) 110 Cal.App.4th 1518, 1524-1525, fns. omitted.)

However, previously, on September 21, 2004, defendant filed a motion to vacate his July 6, 1993 conviction. Similar to his 2009 motion to vacate, defendant asserted that he was not adequately informed by the court of the potential immigration consequences of his plea, in violation of Penal Code section 1016.5. Further, defendant contended that his "lawyer did not adequately inform him of the actual immigration consequences of his plea, in violation of People v. Soriano (1987) 194 Cal.App.3d 1470 . . . ."

On September 28, 2004, the superior court issued an order in which the court noted that defendant had submitted a statutory motion to vacate. Finding the motion was "properly presented," the court set a date for a hearing on the motion. However, citing *People v. Gutierrez, supra*, 106 Cal.App.4th 169, 176, *People v. Soriano, supra*, 194 Cal.App.3d 1470, 1477, and *People v. Gallardo* (2000) 77 Cal.App.4th 971, 987, 988, the court refused to entertain the ineffective assistance of counsel claim based on the court's

understanding that " '[I]neffective assistance of counsel may be raised only by direct appeal or habeas corpus petition.' " Since the time for direct appeal had passed and because defendant was no longer in state custody, the court found that there was no procedural vehicle by which to address the ineffective assistance of counsel claim, but the claim would be relevant on the question of prejudice if there had been a violation of Penal Code section 1016.5.

At the hearing on the motion, the district attorney presented signed declarations of the trial judge and the courtroom clerk from defendant's 1993 plea hearing. Both declarations and supporting documentation indicated that defendant had been given complete immigration advisements when he had entered his guilty plea. Accordingly, the superior court denied defendant's motion.

Defendant appealed to this court. We appointed counsel to represent defendant. Appointed counsel filed an opening brief that stated the facts of the case, but raised no specific issues. Accordingly, pursuant to *People v. Wende* (1979) 25 Cal.3d 436, this court reviewed the entire record and found no arguable issues on appeal.

Defendant petitioned the California Supreme Court for review. On November 16, 2005, the Supreme Court denied review.

Defendant's 2009 motion to vacate is virtually identical to his 2004 motion to vacate. In essence, he asserts that he was not given complete advisements and his attorney did not adequately inform him of the actual consequences of his plea. However, in addition, he claimed that he was " denied the substantial right to negotiate with the prosecuting attorney."

We note three things. First, to the extent that defendant brought his motion to vacate pursuant to Penal Code section 1016.5 and he did not present any evidence that

was different from his 2004 motion, we have already upheld the denial of that motion and the California Supreme Court denied review.<sup>4</sup>

Second, a criminal defendant has no constitutional right to be offered the opportunity to plea bargain. (*Weatherford v. Bursey* (1977) 429 U.S. 545, 561 [97 S.Ct. 837].)

Finally, in his declarations defendant asserts, without any supporting facts, that he would not have pleaded guilty had he known of the consequences of his plea. As a general rule, self-serving declarations lack trustworthiness. (*People v. Duarte* (2000) 24 Cal.4th 603, 613-615.)

Having reviewed the entire record, we find there are no arguable issues on appeal.

*Disposition*

The superior court's denial of defendant's motion to vacate his July 6, 1993 conviction is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.

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<sup>4</sup> This includes his ineffective assistance of counsel claim.